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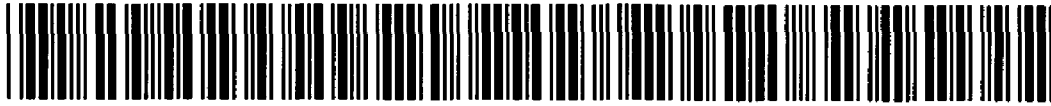
Appellee's Brief 1975-SC-1037

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**KYSC1975-SC-1037-01**

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# **APPELLEE'S BRIEF**

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# SUPREME COURT OF KENTUCKY

File No. 75-1037

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JAMES R. YOCOM, COMMISSIONER  
OF LABOR OF THE COMMONWEALTH  
OF KENTUCKY AND CUSTODIAN OF  
THE SPECIAL FUND, SUCCESSOR  
TO GEORGE R. WAGONER, ACTING  
COMMISSIONER ..... APPELLANT

VS:

GLADYS CHAPMAN, WIDOW OF  
FLEMON L. CHAPMAN, DECEASED;  
SPRING BRANCH COAL COMPANY;  
AND WORKMEN'S COMPENSATION  
BOARD ..... APPELLEES

---

APPEAL FROM THE PIKE CIRCUIT COURT  
HONORABLE REED D. ANDERSON, JUDGE

---

BRIEF FOR APPELLEE CHAPMAN

**FILED**

JAN 20 1976

Martha Layne Collins

CLERK

Supreme Court Of Kentucky

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Attorney for Appellee  
Chapman

This is to certify that pursuant to R.C.A. 1.250 a copy of the within Brief for Appellee Chapman have been served upon Hon. Kenneth E. Hollis, Assistant Counsel, Department of Labor, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202; Messrs. Baird & Baird, Attorneys at Law, Pikeville, Kentucky 41501; Hon. William L. Huffman, Director, Workmen's Compensation Board, Department of Labor, Frankfort, Kentucky 40601 and Hon. Reed D. Anderson, Judge, Pike Circuit Court, Pikeville, Kentucky 41501. This 19 day of January, 1976.

*C. Kilmer Combs*  
Attorney for Appellee Chapman *FCV*

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**COUNTER QUESTION PRESENTED**

Where an employee became disabled from pneumoconiosis on January 10, 1973, timely filed his claim and suffered continuous disability to the date of his death but before an award, is his widow, as his sole dependent, entitled to compensation under KRS 342.316 (4) and KRS 342.730 (4)?

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**APPEAL FROM THE PIKE CIRCUIT COURT  
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---

**BRIEF FOR APPELLEE CHAPMAN**

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**MAY IT PLEASE THE COURT:**

The Statement by appellant, while correct, omits certain pertinent information which requires this, our

## **COUNTERSTATEMENT OF THE CASE**

The facts are simple. Flemon L. Chapman worked for a long number of years in the coal mines

of Pike County, Kentucky, and his wife Gladys was wholly dependent upon him.

On January 10, 1973, Flemon L. Chapman became totally and permanently disabled as a result of coal worker's pneumoconiosis. He filed his claim January 24, 1974, but died on March 10, 1974, before his case could be concluded. The direct cause of death was postoperative shock following a colon cancer operation, but the autopsy disclosed anthracosis (coal miner's pneumoconiosis).

The Workmen's Compensation Board found that Chapman had a valid claim, filed it in his lifetime, and that the appellee Gladys Chapman, as his widow, was entitled to the benefits. The Findings of Fact and Rulings of Law of the Workmen's Compensation Board are not here in dispute (other than their application) and may be of some benefit to the Court set out in brief:

### **"FINDINGS OF FACT**

1. Flemon L. Chapman, during his lifetime, filed a claim for benefits from being disabled from the occupational disease of pneumoconiosis and/or silicosis on January 10, 1973. KRS 342.730(4) provides that an employee who has sustained disability and who has filed a valid claim in his lifetime, and dies from causes other than the injury before the expiration of the compensable period specified, the income benefits specified and unpaid at

the individual's death, whether or not accrued or due at his death, shall be paid, under an award made before or after such death, to various classes of persons.

2. We find that Flemon L. Chapman filed a valid claim during his lifetime and that he died on March 10, 1974, leaving surviving his widow, Gladys Chapman, who was wholly dependent upon him at his death.

3. Decedent's average weekly wage was sufficient to justify maximum compensation.

4. Decedent, age 62 when he filed his claim, worked in the coal mines for approximately 26 years. He became permanently totally disabled on or about January 10, 1973, as a result of the occupational disease of coal workers' pneumoconiosis and/or silicosis. Said date was the last date of his injurious exposure to said disease in Kentucky while employed by the defendant, Spring Branch Coal Company.

5. Defendants received due and timely notice of decedent's claim for compensation.

6. Decedent's disability has not been conclusively proven to be the result of his last exposure.

#### **RULINGS OF LAW**

KRS 342.004

KRS 342.020

KRS 342.316

KRS 342.730(4)



*Maggard v. International Harvester Co., et al., Ky., 508 S.W.2d 777"*

(W.C.B., 125-126)

The foregoing raises the following question on this appeal:

*Where an employee became disabled from pneumoconiosis on January 10, 1973, timely filed his claim and suffered continuous disability to the date of his death but before an award, is his widow, as his sole dependent, entitled to compensation under KRS 342.316 (4) and KRS 342.730 (4)?*

## ARGUMENT

THE WIDOW OF AN EMPLOYEE, WHO WAS TOTALLY DISABLED BY PNEUMOCONIOSIS IN 1973, FILED A TIMELY CLAIM AND DIED FROM OTHER CAUSES IN 1974, IS ENTITLED TO BENEFITS UNDER KRS 342.316 (4) AND KRS 342.730 (4).

Chapman was totally disabled by coal worker's pneumoconiosis on January 10, 1973, and remained so until his death. He filed a timely claim in January of 1974, and he died as a result of a colon cancer operation in March 1974. His widow was substituted, and the Workmen's Compensation Board awarded her benefits under KRS 342.316 (4) and KRS 342.730 (4).

This case is clearly governed by *Falcon Coal Company v. Sweet*, Ky., 518 S.W. 2d 343 (1975). It differs only in that disability occurred in 1973, making the 1973 statutes applicable.

The facts in *Falcon Coal Company v. Sweet*, *supra*, are identical to those here. The thrust of the decision is thus stated in the language of the Court:

"However, subsection (5) of that statute provides "that in case of death where the employe has been awarded compensation or *made timely claim* within the period provided for in this section, and employe has suffered continuous disability to the date of his death occurring at any time within ten (10) years from the date of disability, his dependents, if any, shall be awarded compensation for his death as provided for under the general provisions of the workmen's compensation act and in this section." (Emphasis added.)

[1] We construe the foregoing provision as extending to a timely claim arising from an occupational disease the same status as an award, thus invoking the protection of KRS 342.111 if the employe dies after having filed the claim and if the claim proves to be meritorious."

518 S.W. 2d 344.

The 1972 Legislature, in revamping section 342.316 effective January 1, 1973, moved the former

subsection (5) (referred to in the above quote) to subsection (4) in virtually the identical language:

“ . . . provided further that in case of death where the employe has been awarded compensation or made timely claim within the period provided for in this section, an employe has suffered continuous disability to the date of his death occurring at any time within 20 years from the date of disability, his dependents, if any, shall be awarded compensation for his death as provided for under the general provisions of the Workmen's Compensation Act and in this section.”

KRS 342.111, referred to in *Falcon Coal Company v. Sweet, supra*, was repealed by the 1972 Legislature. The statute reviser notes under KRS 342.730 created by the 1972 Legislature, “Former KRS 342.111 is replaced by (4)”. However, the 1972 Legislature broadened and extended the scope of this provision to embrace any disability where there was either an award or a claim timely filed, whether it be partial or permanent, whether the award was made before or after the death and whether the benefits were accrued or unaccrued. For comparison, we set out the provisions of former section KRS 342.111 followed by its replacement KRS 342.730 (4):

KRS 342.111

“342.111 Continuance of disability payments upon death of employe. When an employe, who

has been awarded disability compensation by the Workmen's Compensation Board, shall die from any cause, whether or not related to the injury or occupational disease, prior to the payment to him of the amount of the award, then the dependents of the deceased employee shall be allowed and paid all allowed and unpaid awards made to such employee." (Repealed, 1972 Legislature)

KRS 342.730 (4)

"(4) When an employee, who has sustained disability compensable under KRS 342.730, and who has filed a valid claim in his lifetime, dies from causes other than the injury before the expiration of the compensable period specified, the income benefits specified and unpaid at the individual's death, whether or not accrued or due at his death, shall be paid, under an award made before or after such death, for the period specified in this section, to and for the benefit of the persons within the classes at the time of death and in the proportions and upon the conditions specified in this section and in the order named:" (1972, c. 78, §14)

It is thus readily seen that the provisions re-enacted by the 1972 Legislature changed only the subsection of KRS 342.316 and liberalized and extended the provisions of KRS 342.111 by repealing it and enacting in lieu thereof KRS 342.730 (4). We note that KRS 342.730 (4) is expressly made applicable to all disability under KRS 342.730, which would include total disability under subsection (1)

(a), partial permanent disability under subsection (1) (b), and scheduled body losses under subsection (1) (c). It is expressly made applicable to occupational diseases by KRS 342.316 (4). KRS 342.316 (4), coupled with KRS 342.730 (4), make the same standard applicable to all disabilities, whether partial or total and whether caused by occupational disease or injury. The 1972 Legislature clearly intended to establish a comprehensive scheme whereby the dependents of disabled decedents who had filed a timely claim before death would receive compensation for the disability after death to the extent that the claim was determined to be valid.

The Workmen's Compensation Board correctly applied the 1973 law, restricting the benefits under this Court's decision in *Maggard v. International Harvester Co.*, Ky., 508 S.W. 2d 777 (1974).

## CONCLUSION

The narrow construction sought by appellant is contrary to this Court's decision in *Falcon Coal Company v. Sweet, supra*, does not conform to the obvious intent of the 1972 Legislature and is wholly without merit. The Judgment below should be affirmed.

Respectfully submitted,

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